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No. 99-1971

IN THE

Supreme Court of the United States

THE PEOPLE OF THE STATE OF CALIFORNIA and
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Petitioners,

vs.

DON SOON PARK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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29pp

QUESTIONS PRESENTED

Does a state procedural default rule lack independence from federal law because it makes an exception for "fundamental error," when "fundamental," as defined by state law, excludes most federal constitutional claims?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

California's procedural default rules are necessary for efficient and timely resolution of an appellant's claims. The Ninth Circuit's refusal to respect these rules in the present case has set a precedent which will needlessly delay enforcement of the state's death penalty, reducing its deterrent effect. These delays are contrary to the rights of victims and society which CJLF was formed to advance.

August, 2000

Respectfully submitted,

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SUMMARY OF FACTS AND CASE

On August 20, 1991, Don Soon Park and two accomplices attempted to rob Munho Kim in the garage of his residence. The two accomplices were caught while fleeing the scene, but Park, the getaway car driver, escaped. *Park* v. *California*, 202 F. 3d 1146, 1148 (CA9 2000), App. to Pet. for Cert. 39a-40a. A year later, Park threatened to blow up the store of Keum Kim and kill her and her family unless she paid him for a debt owed by her son and for alleged defamation by her granddaughter. The store was later destroyed by a pipe bomb. *Ibid.* Park was convicted of conspiracy, burglary, and attempted robbery against Munho Kim and making terrorist threats against Keum Kim, but not of the actual bombing.

Park appealed, claiming only improper joinder of the two cases, and the judgment was affirmed. *Id.*, at 1149, App. to Pet.

for Cert. 41a. After direct appeal was final, Park filed a habeas corpus petition in the California Supreme Court, making three new claims, all of which were based on information available at the time of the appeal and which could have been made then. *Ibid.*

The California Supreme Court, as its usual practice, denied the petition with a citation to *In re Dixon*, 41 Cal. 2d 756, 759, 264 P. 2d 513 (1953). That citation is, in California practice, an unmistakable reliance on a state procedural default rule, specifically that claims that could have been raised on appeal but were not will generally not be considered on habeas.

On federal habeas, the District Court denied the joinder claim on the merits and the other three as procedurally defaulted. *Park*, *supra*, 202 F. 3d, at 1148, App. to Pet. for Cert. 38a. The Court of Appeals reversed the procedural default ruling. It held that the "fundamental constitutional error" exception to the *Dixon* rule rendered that rule not independent of federal law. It interpreted *In re Robbins*, 18 Cal. 4th 770, 959 P. 2d 311 (1998) as indicating that, prior to *Robbins*, the California Supreme Court "necessarily made an antecedent ruling on federal law before applying the *Dixon* bar . . . by concluding that no *fundamental* federal constitutional error had occurred." *Park*, 202 F. 3d, at 1153, App. to Pet. for Cert. 50a (emphasis added).

SUMMARY OF ARGUMENT

The Ninth Circuit's assertion that California courts, in the process of applying the procedural default rule, *necessarily* resolved the merits of any federal constitutional claim, is clearly mistaken. Nothing in the case cited for this proposition says or implies that, and the prior case law is unambiguously to the contrary.

The relation between "fundamental error" or "plain error" exceptions to default rules and the independence of such rules

requires clarification from this Court. The Seventh Circuit has expressly requested clarification in this area. The circuits are divided on the point, although the clear weight of authority is contrary to the Ninth Circuit's position.

ARGUMENT

"No good deed goes unpunished" is the theme of the Ninth Circuit's decision in this case, and in other cases negating California's procedural default rules. Because California has been generous to the indigent, the illiterate, the unrepresented, and others presenting particularly worthy claims for relief, the state must now forfeit its entire body of rules governing procedural default on appeal. Claims never properly presented to state courts by defendants who were provided counsel, ample opportunity, and clear rules on when and how to present them, must now be litigated in federal court, when such claims would have been terminated in less generous states. This perverse result is contrary to the letter and spirit of the "adequate and independent state grounds" doctrine.

I. California does not have, and has never had, an exception for all constitutional claims.

The Ninth Circuit's decision is based on a patently false premise. The court interpreted a statement in a California Supreme Court decision as holding that in applying "the constitutional error exception" to the procedural default rule, the state habeas court "necessarily made an antecedent ruling on the federal law . . . ." *Park* v. *California*, 202 F. 3d 1146, 1153 (CA9 2000), App. to Pet. for Cert. 50a.[1] An elementary survey of California habeas law reveals the error of this statement.

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1. In other words, the Court of Appeals equated California's rule with the Oklahoma rule involved in *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985).

In *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (dissenting opinion), Justice Stevens proposed that a small subset of constitutional claims be deemed so fundamental that they be undefaultable. "Errors of this kind justify collateral relief . . . even though they may not have been preserved properly . . . ." The "category cannot be defined precisely," but it includes mob-dominated trials, known perjury, and brutally extorted confessions. *Ibid.* This exception has not been adopted on the federal level, but one along these lines has been adopted in California. The Ninth Circuit's inability, or unwillingness, to see the distinction between "fundamental," in this sense, and "constitutional" is the root of its error.

A. The Dixon Default Rule.

California's basic rule on availability of habeas is simple. It was clearly stated by Justice Traynor over half a century ago, in the context of a federal due process claim. "A violation of the defendant's constitutional rights during the trial leading to his conviction is ground for attack on the judgment in a habeas corpus proceeding *if the petitioner has no other adequate remedy* to test the constitutionality of the proceedings resulting in his conviction (*In re Bell*, 19 Cal. 2d 488, 494[, 122 P. 2d 22, 26 (1942)] . . . .)." *In re Wallace*, 24 Cal. 2d 933, 938, 152 P. 2d 1, 4 (1944) (emphasis added, additional citations omitted). The italicized clause encompasses the procedural default rule. On constitutional questions, "the court may in its discretion refuse to grant the writ if the remedy by appeal is not exhausted." *Bell*, 19 Cal. 2d, at 495, 122 P. 2d, at 27. This discretionary basis for the procedural default rule is consistent with the federal counterpart. Cf. *Murray* v. *Carrier*, 477 U. S. 478, 497 (1986) ("means of channeling the discretion of federal habeas courts").

In re Dixon, 41 Cal. 2d 756, 759, 264 P. 2d 513, 514 (1953) did not create the procedural default rule but merely applied settled law, holding "in the absence of special circumstances constituting an excuse . . . , the writ will not lie where the

claimed errors could have been, but were not, raised upon a timely appeal . . . ." It was already settled by that time that the rule applied to constitutional claims generally. See *id.*, at 761, 264 P. 2d, at 515. The *Dixon* court noted a possible exception for "*fundamental* constitutional rights," *id.*, at 760, 264 P. 2d, at 515 (emphasis added), but it did not need to dwell on the fundamental/nonfundamental distinction because the factual basis of Dixon's claims had already been resolved against him. *Id.*, at 760-762, 264 P. 2d, at 515-516.

Park maintained in the Court of Appeals that the *Dixon* Court denied the claim on the merits, but a close examination reveals that the court did not itself resolve any disputed question of law or fact on the underlying claim. Instead, the Court noted that the facts had been previously adjudicated, *id.*, at 761, 264 P. 2d, at 515-516, and that because of the default Dixon was not entitled to reconsideration of the facts. *Id.*, at 762, 264 P. 2d, at 516. The "difficult questions of law" presented by petitioner's version of the facts, *ibid.*, therefore did not need to be addressed. This is a ruling in the nature of collateral estoppel rather than *de novo* adjudication of the "merits" as that term is normally understood.

The "fundamental" exception had been invoked the year before in *In re James*, 38 Cal. 2d 302, 240 P. 2d 596 (1952). This was a claim of complete denial of counsel to an indigent murder defendant. See *id.*, at 307-308, 240 P. 2d, at 599-600. The court excused the failure to appeal by this borderline literate defendant based on the fundamental nature of the right to counsel. See *id.*, at 309-310, 240 P. 2d, at 600-601. The California courts' extra solicitude for denial-of-counsel claims, above that for other constitutional claims, is entirely in keeping with this Court's jurisprudence. See *United States* v. *Morgan*, 346 U. S. 502, 512 (1954) (common law coram nobis for denial of counsel claims); *Arizona* v. *Fulminante*, 499 U. S. 279, 309 (1991) (included in small set of errors deemed "structural" and never harmless); *Custis* v. *United States*, 511 U. S. 485, 496 (1994) (violation of rule of *Gideon* v. *Wainwright*, 372 U. S.

335 (1963), a "unique constitutional defect," is only claim cognizable in attack on prior at sentencing for new offense); *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) (*Gideon* as exemplar of rule qualifying for second exception to rule of *Teague* v. *Lane*, 489 U. S. 288 (1989)). To the same effect is *In re Lopez*, 2 Cal. 3d 141, 151, 465 P. 2d 257, 263 (1970), noting the special status of *Gideon* claims. By no stretch of the imagination does this appropriate generosity for *Gideon*-type claims translate to a waiver of default for all constitutional claims.

The 1960s saw the creation of a number of nonfundamental federal constitutional rules of criminal procedure. The first and foremost of these is *Mapp* v. *Ohio*, 367 U. S. 643 (1961), a rule which actually detracts from, rather than enhances, the accuracy of the result of the trial. See *Stone* v. *Powell*, 428 U. S. 465, 489-491 (1976). *In re Lessard*, 62 Cal. 2d 497, 399 P. 2d 39 (1965) presented the question of whether claims under the exclusionary rule, now constitutionalized and applicable to the states, would be considered despite default. The court held that such claims would be barred if they were defaulted at trial or on appeal. *Id.*, at 503, 399 P. 2d, at 43. Lessard's claim was independently barred on both grounds. *Ibid.*; accord, *In re Sterling*, 63 Cal. 2d 486, 489, 407 P. 2d 5, 8 (1965).

Mapp and *Gideon* are the "polar extremes" on the fundamental/nonfundamental continuum. See *In re Harris*, 5 Cal. 4th 813, 831, 855 P. 2d 391, 399 (1993). While the California Supreme Court never expressly drew the line between them before *Harris*, it is clear that most claims fall on the nonfundamental side. *In re Shipp*, 62 Cal. 2d 547, 551-552, 399 P. 2d 571, 575 (1965) applied the *Dixon* rule to an involuntary confession claim. *In re Ronald E.*, 19 Cal. 3d 315, 321-322, 562 P. 2d 684, 688 (1977) applied the default rule to a claim under *Boykin* v. *Alabama*, 395 U. S. 238 (1969).

The independence of the procedural default rule from the merits of the federal constitutional claim is abundantly clear from these cases. In *Shipp*, the petitioner's allegations, if true, would unquestionably amount to a violation of both due process

and the Fifth Amendment. See *Shipp*, *supra*, 62 Cal. 2d, at 550-551, 399 P. 2d, at 574. Yet the court held that there were "three fundamental reasons why the writ should not issue: first, habeas corpus cannot serve as a substitute for appeal in the absence of special circumstances; second, petitioner neither specifies such special circumstances nor alleges the reasons for his delay in this late presentation, and, third, the recent decisions of the United States Supreme Court do not call for any different resolution of the issue." *Id.*, at 551-552, 399 P. 2d, at 575.[2] Yet Shipp certainly *did* specify a federal constitutional claim, and a meritorious one if his allegations were true. *Shipp* thus holds that a meritorious federal constitutional claim alone does not amount to an exception from the *Dixon* rule. The rule may bar the claim independently of the merits.

Even more clear is *In re Ronald E.*, *supra*. In that case, the prosecution conceded that Ronald *did*, at one time, have a meritorious *Boykin* claim. *Ronald E.*, *supra*, 19 Cal. 3d, at 321, 562 P. 2d, at 688. Yet the court held the claim barred despite the merits, due to failure to appeal. *Id.*, at 321-322, 562 P. 2d, at 688. If a court can deny a claim despite conceded merits, then it can certainly deny a claim without addressing the merits.

California law up through 1993 was clear on the point relevant to this case. The *Dixon* rule was a standard procedural bar against raising, on habeas, claims defaulted on appeal. The rule had generous exceptions, including one for "fundamental" claims, but a decision that a claim did not qualify for the exceptions did not require resolution of the merits of a federal constitutional question.

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2. The last point refers to the 1963 habeas "trilogy." See *id.*, at 553, 399 P. 2d, at 576 (citing *Fay* v. *Noia*, 372 U. S. 391 (1963); *Townsend* v. *Sain*, 372 U. S. 293 (1963); *Sanders* v. *United States*, 373 U. S. 1 (1963)).

B. The Waltreus Reconsideration Rule.

A related but distinct rule is the rule that a claim considered and rejected on appeal will not be considered again. *In re Waltreus*, 62 Cal. 2d 218, 225, 397 P. 2d 1001, 1005 (1965) is traditionally cited for this rule, although that case merely applied settled law.

There are important differences between the default rule and the reconsideration rule, however. A claim barred from further consideration in state court by *Waltreus* has been exhausted and may proceed on federal habeas. It is not defaulted. See *Fields* v. *Calderon*, 125 F. 3d 757, 762, n. 5 (CA9 1997). More importantly, for the purpose of this case, California courts before 1993 were more expansive with the exceptions to *Waltreus* than they were with *Dixon*.

In re Winchester, 53 Cal. 2d 528, 531, 348 P. 2d 904, 906 (1960) involved a habeas petition "based upon the same grounds as those urged . . . on the appeal." The opinion indicates that reconsideration "even after affirmance on appeal" is available for defects which "violate the fundamental aspects of fairness and result in a miscarriage of justice." *Id.*, at 531-532, 348 P. 2d, at 906. The court does not elaborate on this, as it ultimately rejects the claims on the merits. *Id.*, at 535, 348 P. 2d, at 909.

In re Jackson, 61 Cal. 2d 500, 393 P. 2d 420 (1964) expressly distinguishes repeated claims from defaulted claims. "We do not engage in the kind of rescue operation in which a petitioner asks a court to issue a writ to salvage an effective point which he missed or waived." *Id.*, at 506, 393 P. 2d, at 423. *Jackson* quotes *Sunal* v. *Large*, 332 U. S. 174, 181 (1947) as support for the different treatment. *Id.*, at 506, n. 4. Therefore, California cases on the scope of exceptions to *Waltreus* before 1993 are not authority for the scope of exceptions to *Dixon*.

The outer limit of the exception to *Waltreus* can be seen in *In re Coughlin*, 16 Cal. 3d 52, 55-56, 545 P. 2d 249, 251

(1976). The court proceeded to the merits of a previously litigated claim that revocation of probation for an offense for which the probationer had been acquitted violated due process. This repetitive claim was no more fundamental than the claims routinely rejected for default, see *supra*, at 6, although the decision may have been influenced by the lack of opposition from the prosecution. See *id.*, at 56, 545 P. 2d, at 251. There do not appear to be any California Supreme Court cases similarly waiving the *Dixon* rule for such a routine claim.

C. In re Harris.

The California Supreme Court's decision in *In re Harris*, 5 Cal. 4th 813, 855 P. 2d 391 (1993) is clear enough on its face, but it becomes even more clear in light of the foregoing history. *Harris* unambiguously narrowed, rather than expanded, the "fundamental" exception to *Waltreus*, and the narrowed exception also applies to *Dixon*. An interpretation of *Harris* to create an *Ake*-type exception for all constitutional claims is unsupportable.

Before discussing *Harris*, we should note that it was decided with a companion case, *In re Clark*, 5 Cal. 4th 750, 855 P. 2d 729 (1993). *Clark* dealt only with the delayed petition and successive petition rules and expressly disclaimed any consideration of the *Dixon* and *Waltreus* rules. See *id.*, at 768-769, n. 8, 855 P. 2d, at 741, n. 8. For the status of the *Dixon* rule, then, we need only look to *Harris*, in the light of prior default cases.

Harris sought to relitigate on habeas a question resolved against him on appeal. The state cited the *Waltreus* rule, and Harris sought to invoke the *Winchester* exception. See *Harris*, *supra*, 5 Cal. 4th, at 824-825, 855 P. 2d, at 395. The court noted, "much of the following discussion also applies to the so-called '*Dixon* rule'. . . ." *Id.*, at 825, n. 3, 855 P. 2d, at 395, n. 3.

Discussing the history of the *Winchester* exception, *Harris* notes, "Certainly not all alleged constitutional defects warrant the opportunity to relitigate the issue on habeas corpus." *Id.*, at 830, 855 P. 2d, at 399. The court contrasts Fourth Amendment claims, which did not qualify for the exception, with *Gideon* claims, which did. *Id.*, at 830-831, 855 P. 2d, at 399. The distinction is between "fundamental" rights and others; not all constitutional claims are included. See *id.*, at 831-832, 855 P. 2d, at 399.

Harris then reviews how the evolution of ineffective assistance claims has the effect of softening otherwise harsh procedural default rules, diminishing the need for broad exceptions. *Id.*, at 832-834, 855 P. 2d, at 400-402. This conclusion is in harmony with this Court's decision in *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986). The *Harris* Court then decided that *Winchester* "is inappropriately broad" and adopted "a narrower exception." 5 Cal. 4th, at 834, 855 P. 2d, at 402. Any interpretation of *Harris* must bear in mind that its exception is expressly narrower than prior law.

Harris then defines the exception as "where the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process . . . ." *Ibid.*, citing *Arizona* v. *Fulminante*, 499 U. S. 279, 309 (1991). Turning to the cited page of *Fulminante*, we see that the court is referring to the very limited subset of constitutional errors referred to as "structural defects." *Gideon* and *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (biased judge) are the examples cited. The list of nonstructural constitutional claims is much longer, see *Fulminante*, 499 U. S., at 306-307, 311, and it includes very important rights.

Reading *Harris* in light of the history of the exception, its stated purpose to narrow it, and the reference to *Fulminante*, it is clear that the exception as reformulated in *Harris* is far narrower than the one in *Ake* and does not require an examination of the merits of every federal constitutional claim. The latter interpretation would be broader than *Winchester*, rather

than narrower. It would not serve the purpose the *Harris* Court stated for the rule, to "reflect[ ] the proper balance between the state's interest in finality and the individual's interest in vindicating his constitutional rights." *Harris*, *supra*, 5 Cal. 4th, at 834, 855 P. 2d, at 402. Such a rule would completely toss aside the "state's considerable interest." *Ibid.*

The various ways a "fundamental error" claim can be resolved is illustrated by this Court's application of the analogous, although broader, "plain error" rule of Federal Rule of Criminal Procedure 52(b). This rule is, in effect, an exception to the procedural default rule for claims defaulted at trial and asserted on appeal. "[B]efore an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' " *Johnson* v. *United States*, 520 U. S. 461, 466-467 (1997). Further, relief can be granted "only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *Ibid.* (some internal quotation marks omitted).

As with other multipronged tests, there is no requirement to take them in order, and a court can stop when it finds any one of the four not met. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984). A court can assume without deciding that an event at trial was "error" and deny the claim for lack of effect on substantial rights, *i.e.*, that defendant did not affirmatively establish prejudice. See *United States* v. *Olano*, 507 U. S. 725, 737, 741 (1993). Such a holding is independent of the merits, because a properly preserved claim of error warrants reversal unless harmless, under a standard much more favorable to the defendant. Cf. *Chapman* v. *California*, 386 U. S. 18, 24 (1967) (constitutional errors); *Kotteakos* v. *United States*, 328 U. S. 750, 765 (1946) (nonconstitutional errors). *Johnson*, *supra*, denied relief despite a "plain error," see 520 U. S., at 468, because the error did not meet the fourth criterion. *Id.*, at 469. In the context of the particular case, the overwhelming evidence of guilt was sufficient to negate this prong, there being no "miscarriage of justice."

In some cases, though, a "plain error" argument can be rejected on the basis that there is no error, much less a "plain" error. *Jones* v. *United States*, 527 U. S. 373, 390 (1999) rejected a claim on that basis, with an alternative holding of no prejudice. See *id.*, at 394-395.

While rejection on the merits is a possible mode of denying a "plain error" claim, it would typically not be the most efficient. If the question presents any difficulty, it would be simpler to reject it as not "plain," because "a court of appeal cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law." *Olano*, *supra*, 507 U. S., at 734. Decision of a close question on the merits may be appropriate, despite the inefficiency, if it produces a published opinion settling the question for future cases, as in *Jones*, but this factor would not apply to summary dispositions.

With these principles in mind, we return to the California Supreme Court's decision in *In re Harris*, *supra*. The requirement, again, is that "the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process . . . . " 5 Cal. 4th, at 834, 855 P. 2d, at 402. " 'Plain' is synonymous with 'clear' or, equivalently, 'obvious.' " *Olano*, 507 U. S., at 734. The California rule thus incorporates the first two *Olano* elements precisely. The "fundamental" element, though, is more restrictive than "substantial."

With both rules, then, we see that a meritorious claim, *i.e.*, "error," is a necessary but not sufficient condition for relief. *Harris*, like *Jones*, rejected the claim by finding no error. 5 Cal. 4th, at 835-836, 855 P. 2d, at 403. It did not, however, hold or even remotely imply that such a finding was necessary or even the usual mode of addressing claims of exception to the *Waltreus* and *Dixon* rules.[3]

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3. The fact that a "no error" finding is a possible mode of decision raises a more subtle point, which we discuss in part II, *infra*.

D. In re Robbins.

The Ninth Circuit's conclusion that "the California Supreme Court *necessarily* made an antecedent ruling on federal law before applying the *Dixon* bar" in this case, see *Park* v. *California*, 202 F. 3d 1146, 1153 (2000), App. to Pet. for Cert. 50a, was not based on *Harris*, the present case, or any case in existence at the time of the state court's decision in this case. It was instead based on a statement in a case decided three years later, *In re Robbins*, 18 Cal. 4th 770, 959 P. 2d 311 (1998). We may assume for the sake of argument the propriety of looking to a later case to construe an earlier one. But cf. *Federal Housing Administration* v. *Darlington, Inc.*, 358 U. S. 84, 90 (1958) (act of later legislature not conclusive on construction of earlier act). *Robbins* quite simply does not say what the Ninth Circuit attributed to it.

As noted, *supra*, at 11-12, it is *possible* to dispose of a claim of "plain error" or "fundamental error" by deciding that there was no error at all: plain, fundamental, or otherwise. This Court did so in *Jones*, *supra*, 527 U. S., at 390, and the California Supreme Court did so in *Harris*, *supra*, 5 Cal. 4th, at 833-836, 855 P. 2d, at 403. The question is whether California courts *invariably* denied claims on that basis before *Robbins*.

The *Robbins* case involved the timely petition rule, not the *Dixon* default-on-appeal rule. See 18 Cal. 4th, at 779, 959 P. 2d, at 357. The exceptions to the two rules are not identical, and *Robbins* refers to them separately. See *id.*, at 814, n. 34, paras. 5 & 6, 959 P. 2d , at 340-341, n. 34, paras. 5 & 6. For the present discussion, though, we will assume *arguendo* that the corresponding "fundamental" exceptions of *Harris* and *In re Clark*, 5 Cal. 4th 750, 797-798, 855 P. 2d 729, 760-761 (1993) are equivalent. The *Robbins* court simply announced that, for that case and in the future, the California Supreme Court would no longer take the approach taken by *Jones* and *Harris*. That is, the court will always henceforth take the approach of *Olano*, assuming "error" *arguendo* and asking if

the other requirements of the exception have been met. *Robbins*, 18 Cal. 4th, at 811, 959 P. 2d, at 338-339.

Nothing in this statement says or even remotely implies that in past cases the court *always* took the *Jones/Harris* approach of addressing "error" before the other elements. On the contrary, in footnote 1 the court expressly states that procedural default has often been the basis for rejection of the petition without considering the merits or as an alternative holding to the merits. *Id.*, at 778, 959 P. 2d, at 316.

The Ninth Circuit draws a negative inference about the past from a statement about the present and future. The statement does not support the inference. A statement "we will not do X" may imply "we previously sometimes did X," but by *no* stretch of logic could it be deemed to imply "we always did X." Given the clear history to the contrary discussed in part I A, *supra*, at 4-7, the Ninth Circuit's inference that the post-*Harris*, pre-*Robbins* exception was an *Ake*-type exception rather than an *Olano*-type exception is patently false.

II. The weight of authority holds that similar "fundamental error" or "plain error" exceptions do not negate the independence of state procedural default rules.

If the Ninth Circuit had correctly understood California law, it might have rested its "independence" holding on a ground that is at least arguable. When a claim of "plain error" or "fundamental error" *might* be rejected with a holding that there is no error, there is a split of authority as to whether the rule is "independent." In this part, we discuss the split, and in part III, *infra*, we discuss why it is important that this Court resolve the split.

The Seventh Circuit noted the need for Supreme Court guidance in *Willis* v. *Aiken*, 8 F. 3d 556 (1993). "This case requires that we apply [procedural default] principles to a specific but recurring litigation problem that has *not yet been*

the focus of Supreme Court guidance: when the state court addresses a federal constitutional issue but only to determine whether it ought to disregard its waiver rule on the ground that the federal constitutional issue constitutes 'fundamental error.' " *Id.*, at 561-562 (emphasis added).

Willis involved the Indiana "fundamental error" exception to its procedural default rule. There, as in California, the exception "encompasses matters of federal constitutional law," but "not all federal constitutional errors are deemed fundamental." *Id.*, at 566. "To survive the procedural requirements, the error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." *Ibid.* (quoting *Wilson* v. *State*, 514 N. E. 2d 282, 284 (Ind. 1987)). This is, for present purposes, equivalent to the *Harris* rule in California. There must be an error, the error must be "blatant" or "clear," and it must be a fundamental one. *Willis* concluded that the state court's determination in applying this rule "rests on an independent and adequate state ground." *Id.*, at 567. This holding is in clear conflict with the Ninth Circuit's contrary conclusion on an equivalent rule.

Willis agreed with the decision of the Tenth Circuit in *Gutierrez* v. *Moriarty*, 922 F. 2d 1464 (1991). In that case, as in the present case, the habeas petitioner argued that "New Mexico has a fundamental error exception to its procedural bar analogous to the Oklahoma exception . . . in *Ake* v. *Oklahoma*, 470 U. S. 68, 74-75 . . . (1985)." *Id.*, at 1468. The court rejected the analogy because, as in the present case and *Willis*, "unlike Oklahoma, New Mexico does not equate fundamental error with federal constitutional error." *Id.*, at 1469. *Gutierrez* noted the various modes for resolving a "fundamental error" contention, along the lines of our discussion of "plain error." That is, the state court may or may not consider whether there was "error." Compare *ibid.*, with *supra*, at 11-12. "As a general rule, therefore, application of New Mexico's procedural bar rule constitutes an independent state ground because it does

not require a ruling on the merits of the federal claim." *Ibid.* (emphasis in original). As California's resolution of "fundamental error" follows the same lines, this holding is in clear conflict with the holding in the present case.

The Sixth Circuit at one point took a position consistent with the Ninth's in an unpublished opinion, but it has since repudiated that position. In *Scott* v. *Anderson*, 58 F. Supp. 2d 767, 787 (ND Ohio 1998), the District Court held that Ohio's "plain error" rule was not independent, quoting and relying on *Knuckles* v. *Rogers*, No. 92-3208, 1993 WL 11874 (CA6, Jan. 21, 1993) (*per curiam*):

> "The basic inquiry in the plain error analysis in Ohio is whether the defendant has been denied a 'fair trial.' Whether a person is denied a fair trial is a question to be resolved by applying principles of federal constitutional law. Therefore, we conclude that the Ohio appellate court's decision was not independent of federal law."

On appeal, the Sixth Circuit reversed, and it repudiated *Knuckles*, finding it inconsistent with both *Engle* v. *Isaac*, 456 U. S. 107 (1982) and *Coleman* v. *Thompson*, 501 U. S. 722 (1991). *Scott* v. *Mitchell*, 209 F. 3d 854, 867-868 (2000). The Sixth Circuit reads *Coleman* as holding that "the mere reservation of discretion to review for plain error in exceptional circumstances [is not] sufficient to constitute an application of federal law." *Id.*, at 868.

The First Circuit has taken the same position with regard to the Massachusetts "miscarriage of justice" exception. See *Puleio* v. *Vose*, 830 F. 3d 1197, 1200 (1987); *Simpson* v. *Matesanz*, 175 F. 3d 200, 205, 209 (CA1 1999). The Fourth Circuit, resolving the issue left open in *Coleman*, *supra*, 501 U. S., at 741, has held that *Ake* does not apply in the habeas context at all. *O'Dell* v. *Netherland*, 95 F. 3d 1214, 1244 (1996), aff'd on other grounds, 521 U. S. 151 (1997).

There are a few cases leaning in the other direction. *Roy* v. *Coxon*, 907 F. 2d 385, 391 (CA2 1990) found that the Vermont

Supreme Court's application of its plain error rule in the particular case was not independent, but stopped well short of the kind of blanket holding rendered in the present case. The Eighth Circuit has intracircuit split. See *Hornbuckle* v. *Groose*, 106 F. 3d 253, 257 (CA8 1997). One branch is consistent with the weight of authority, *i.e.*, "a properly limited plain error review by a state court does not cure a procedural default." *Toney* v. *Gammon*, 79 F. 3d 693, 699 (CA8 1996). The other branch has a unique twist. It holds that plain error review opens the question to the federal court, but only for "plain error resulting in manifest injustice." *Hornbuckle*, 106 F. 3d, at 257. Again, this is well short of the holding of the present case, which opens *all* defaulted claims in California to full blown litigation in federal court.

In summary, the holding in the present case is contrary to the overwhelming weight of authority from the other circuits. "The ultimate answer to this quandary can, of course, only be supplied by the Supreme Court." *Willis*, *supra*, 8 F. 3d, at 565. This case is a prime candidate for certiorari. Supreme Court Rule 10(a), (c).

III. The Ninth Circuit's severe approach to procedural default creates a perverse incentive and will further obstruct an already clogged system of review.

No other circuit subjects any other state to the kind of "pointless severity," cf. *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), that the Ninth Circuit has applied to California in the present case and related cases. See Pet. for Cert. 11, and n. 3. The reasons for not doing this have been stated in many opinions in other circuits. As then-Judge Breyer wrote for the First Circuit:

> "If federal habeas courts were too ready to find that state 'miscarriage of justice' review constitutes 'waiver' of the state's procedural rules, the state either would have to convert what is often a speedy reviewing task into a full

> scale detailed examination of federal law *or it would have to abandon 'miscarriage of justice' review altogether. The latter alternative seems highly undesirable.* The former conflicts with the theory of *Wainwright* [v. *Sykes*, 433 U. S. 72 (1977)]." *McCown* v. *Callahan*, 726 F. 2d 1, 3-4 (1984) (emphasis added).

"Undesirable" is an understatement. If generosity in exceptions means effective destruction of the rule, imposing on the state the burden of litigating a tidal wave of marginal claims that should have been precluded, the pressure is strong to shut down the exceptions. That result was "undesirable" in 1984, and it is even more so with the limitations placed on federal habeas since then. State habeas should be the principal means of addressing claims that could not be made on appeal and also claims that ought to be considered, despite appellate default, to prevent a miscarriage of justice. The latter exception for rare cases ought not expose the state to litigation of a flood of worthless, defaulted claims. If making an exception for the needle means being buried by the haystack, the state may conclude the needle is not worth the price. Cf. *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the judgment).

Does California have to abolish *all* the exceptions to its procedural default rule, and adopt a rule of uncompromising rigidity, heedless of miscarriages of justice, before the Ninth Circuit respects its rules? This would appear to be the import of this relentless parade of decisions. *Fields* v. *Calderon*, 125 F. 3d 757, 763 (CA9 1997) held the pre-*Harris* rule "inadequate" for allowing discretion without rigid standards. A cutback was made in *Harris*, but the present case holds that was not enough. A further refinement was made in *Robbins*, but the present case ominously threatens that may still not be enough. See *Park* v. *California*, 202 F. 3d 1146, 1153 (CA9 2000), App. to Pet. for Cert. 49a. If the requirement for an adequate, independent exception is going to be moved every time, the only sure way to fix the problem is to repeal all the exceptions.

Other courts have recognized the utter folly of this course. As the Seventh Circuit noted on a related point, an overly severe approach "would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others. Neither prisoners' interests nor the interests of federalism would be served by such a development." *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1384 (1990).

Opposing rehearing in the Court of Appeals, Park maintained that the decision in this case "has little practical effect on the procedural import of a *Dixon* default." Appellant's Response to Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc 17. "*Park* merely extends the effect of *Fields* to 1998 . . . . " *Ibid.* That is, *Park* "merely" extends the complete obliteration of California's procedural default rules for all the cases decided in an additional five-year period.

This statement assumes, first, that *Fields* was correctly decided and its holding will not be eventually overturned by this Court. Although certiorari was denied in that case, see *Calderon* v. *Fields*, 523 U. S. 1132 (1998), that denial says nothing about the merits, and there are many cases remaining in the pipeline which may serve as vehicles to overturn that manifestly erroneous decision. See generally Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Calderon* v. *Fields*, No. 97-1262. Even assuming that *Fields* does escape review, though, the impact of this case goes beyond California. As the cases in part II illustrate, many states have similar rules, and this case will serve as a precedent, binding in the other states of the Ninth Circuit and possibly followed elsewhere, to similarly obliterate the procedural default rules of other states for the sin of excess generosity. It will serve as an incentive for other states to curtail or eliminate the exceptions for their default rules until the uncertainty it creates is resolved.

Even within California, the impact is far greater than fits the word "merely." Although this is not a capital case, its impact will be the greatest in those cases. From July 1993 to June

1998, a span slightly less than the interval from *Harris* to *Robbins*, the California Supreme Court decided 71 capital appeals and 155 habeas petitions related to capital appeals. Judicial Council of California, Court Statistics Report 6 (1999). Given the tendency of the capital defense bar to make a plethora of additional claims at every stage of proceedings, this translates to thousands of claims that should be precluded by the default-on-appeal rule, the successive petition rule, the delayed petition rule, or some combination of these. Since the opinion in the present case seems to apply indiscriminately to all these rules, see App. to Pet. for Cert. 47a-50a, all these barred claims will have to be litigated in federal court. This mass of defaulted claims will further contribute to the already atrocious delays that California's capital cases face in federal court, exactly what Congress sought to correct with the Antiterrorism and Effective Death Penalty Act of 1996. See 141 Cong. Rec. 14,734 (1995) (statement of Sen. Feinstein).

This case is important, both for its massive impact on California and for its potential detrimental effects elsewhere.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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